Supreme Court, U.S.
FILED
MAR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1299

In the Supreme Court of the United States

OCTOBER TERM, 1987

COLONY SQUARE COMPANY,
a Georgia Limited Partnership,
Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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I.

CONTRARY TO PRUDENTIAL'S REPEATED IMPLICATIONS, THE PARTIES FULLY BRIEFED AND ARGUED BELOW THE ISSUES UNDER § 455(a) THAT ARE CLOSELY RELATED TO, BUT SIGNIFICANTLY DIFFERENT FROM, LILJEBERG V. HEALTH SERVICES ACQUISITION CORP.

The issues in *Liljeberg v. Health Services Acquisition Corp.* (Sup. Ct. Docket No. 86-957) are: (1) whether 28 U.S.C. § 455(a) applies when a judge decides a case after having forgotten the circumstances that would cause his impartiality to be questioned, and (2) whether, when the judge and the prevailing party had been innocent of conscious wrongdoing, the retroactive remedy of vacating the judge's decision is appropriate.

The present case presents the more common situation in which the judge has failed to recuse himself despite having been aware of the facts that required his disqualification. In addition, unlike *Liljeberg,* the prevailing party in this case was an active participant in the misconduct warranting disqualification and, therefore, cannot be said to have "fairly won." *Health Services Acquisition Corp. v. Liljeberg,* 796 F.2d 796, 802 (5th Cir. 1986), *cert. granted,* 107 S.Ct. 1368 (1987). Judge Robinson and Prudential's lawyers colluded together in the clandestine *ex parte* contacts; Prudential's lawyers secretly authored the opinions that Judge Robinson then filed verbatim as his own;[1] Prudential's counsel made false state-

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1. It is highly misleading for Prudential to say that Judge Robinson "specif[ied] the points to be included" in the ghost-written opinions. *See, e.g.,* Brief in Opposition at 6. In fact, the opinions as authored by Prudential went well beyond the few points that Judge Robinson sketchily outlined in his *ex parte* telephone calls. *See,* Petition For Writ at 4-5.

ments, both in open court and in affidavits, denying the *ex parte* contacts; and Judge Robinson endorsed the false affidavits in an opinion denying a motion to recuse himself.[2] Thus, the issue of retroactively vacating the judge's orders is presented in this case in a significantly different context from *Liljeberg*.

In our Petition, we have shown that this case raises important issues for this Court to resolve under 28 U.S.C. § 455(a) as well as under the Due Process Clause. Recognizing the close relationship between this case and *Liljeberg* with regard to § 455, Prudential has implied that Colony Square's present reliance on § 455 is an afterthought, that the statute was not adequately briefed and argued in the courts below, and that this Court therefore should not review the issue. *See, e.g.*, Brief in Opposition, p. 15, n. 15. That is a false implication. In fact, the Argument in Petitioner's Brief in the Eleventh Circuit had only three major parts, and the second of them

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2. *See* Petition For Writ at 2-8. In its Brief in Opposition, Prudential repeatedly suggests that Colony Square was aware of these clandestine activities and failed to complain in timely fashion. The Eleventh Circuit has flatly rejected that contention:

> . . . It was not until months later that Colony's lawyers first learned that Judge Robinson had not drafted these three orders.
>
> On learning that Alston & Bird had drafted these orders, Colony reasserted its motion for disqualification and the other relief sought here.

Pet. App. A3 (Opinion of the Court of Appeals).

Moreover, the fact that Colony Square was told of the preparation of certain "other orders" is beside the point. If the practice had been to notify Colony Square of Prudential's preparation of orders, the departure from this practice, far from arousing Colony Square's suspicion, was designed to deceive Colony Square into thinking that the orders at issue had been prepared by the Court and not Prudential's lawyers.

dealt exclusively with § 455.[3] *Liljeberg* itself was cited five times in Petitioner's Brief and Reply Brief. Prudential's Brief also recognized the importance of § 455, devoting seven pages of argument to it.[4]

It is true that the Eleventh Circuit nevertheless chose to deal with § 455 in a cursory fashion.[5] That, however, does not make the issue any less important. On the contrary, it is essential that § 455 be taken seriously by the courts, as Congress intended and as justice requires.

Further, the Eleventh Circuit's expressed grounds for holding the statute inapplicable are no less wrong for having been stated in a footnote. The Eleventh Circuit held that § 455(a) requires disqualification only in cases in which the judge has "financial or personal conflicts." The effect of that ruling would be virtually to abrogate § 455(a), because subsection (b) of the statute deals explicitly with financial and personal conflicts of interest. By contrast, subsection (a) was "designed as a catch-all provision of broader scope than the combined specific disqualification provisions of subsection (b)."[6] Indeed,

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3. II. JUDGE ROBINSON'S SECRET *EX PARTE* CONTACTS MIGHT REASONABLY CAUSE HIS IMPARTIALITY TO BE QUESTIONED, AND HE THEREFORE WAS OBLIGATED TO RECUSE HIMSELF *SUA SPONTE*. . . .

"Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). . . .

Brief For Appellant, Eleventh Circuit, at 24.

4. Brief of Appellee, Eleventh Circuit, at 34-40.

5. Pet. App. at A8, n. 14.

6. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 Case W. Res. L. Rev. 662, 670-671 (1985); *see also id.* at 675.

the only authority on which the Eleventh Circuit relied, 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3549 (2d ed. 1984), states:

> Because of this general provision of § 455(a), an overly-nice reading is not required of the specific instances of disqualification spelled out in § 455(b). . . . There are many other instances in which the general provision of sec. 455(a) will be applicable in order to preserve the appearance of impartial justice. . . .

Thus, the Eleventh Circuit's destructive interpretation of § 455(a) effectively condones judicial misconduct by denying any meaning to that "catch-all" or "general" provision. Regardless of how cursorily the Eleventh Circuit may have ruled, its holding is contrary to precedent and to the sound administration of justice, and should not be allowed to stand.

II.

THE COURT SHOULD ADDRESS PRUDENTIAL'S CONTENTION THAT A JUDGE'S WILLFUL REFUSAL TO RECUSE HIMSELF WHEN REQUIRED TO DO SO CAN BE TREATED AS HARMLESS ERROR.

Colony Square has shown that Judge Robinson's failure to recuse himself caused prejudice to Colony Square as well as to the administration of justice. *See* Petition For Writ at 20-25. Prudential has not attempted to refute that showing. Rather, it has simply asserted that there was no prejudice and has contended, in effect, that Judge Robinson's willful failure to recuse himself

when required to do so is harmless error because he reached a firm decision before having his opinions ghost-written, and because his orders were affirmed on appeal.[7]

The conclusion that Judge Robinson had reached a firm decision before initiating *ex parte* calls to Prudential is based principally upon his own unchallenged self-serving answers to interrogatories.[8] More important, his highly improper conduct casts doubt upon the impartiality of his orders regardless of when he claims to have made up his mind. Consider an analogy. A man gets a full series of blood tests at a laboratory. The report comes back that all of his readings are normal and, in addition, that he is pregnant. If the man is reasonably prudent, he will not only disregard the pregnancy diagnosis, he will also have the entire blood test redone at a different laboratory. Similarly here. Since Judge Robinson has proved himself to have been seriously injudicious and lacking in impartiality, his rulings in the case are suspect regardless of whether a particular decision was made before or after an improper telephone call took place.[9]

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7. *Compare* this Court's recent unanimous decision (Justice Kennedy not participating) in *Peralta v. Heights Medical Center, Inc.*, 56 U.S.L.W. 4189, 4191 (U.S. Feb. 23, 1988):

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' . . . [O]nly 'wiping the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.'

8. Colony Square was not permitted to depose Judge Robinson. *See* Petitioner's Brief, p. 23, fn. 61.

9. For the same reason, contrary to Prudential's assertion, Colony Square does not limit its challenge to the three ghost-

(Continued on following page)

Further, adoption of a rule that appellate review is sufficient to cure a judge's failure to recuse himself would vitiate the recusal statute. If, on appeal, the judge were reversed on the merits, the litigant who lost below because of the judge's bias would have no occasion to complain. If, on the other hand, the judge's opinion were affirmed on appeal, the unfairness (according to Prudential) should be deemed to have been harmless. Thus, the statute would be rendered irrelevant in every case, including, as here, the case in which the judge willfully fails to recuse himself despite the clear command of 28 U.S.C. § 455(a).

Footnote continued—

written orders. Because Judge Robinson's lack of impartiality is manifest in his extremely injudicious conduct on several occasions, other orders in the case have also been tainted. That includes the May 14, 1984, order (in the month before the first *ex parte* telephone call) that severed Colony Square's claim that Prudential had intentionally mismanaged the Colony Square complex in order to obtain title to it.

CONCLUSION

This case complements *Liljeberg v. Health Services Acquisition Corp.* in providing the Court with the opportunity to address issues of major importance regarding 28 U.S.C. § 455(a) and the administration of justice. Among those issues is one raised by Prudential's Brief in Opposition—that a judge's willful failure to recuse himself when required to do so can be treated as harmless error and his tainted orders allowed to stand. Also, contrary to implications by Prudential, § 455 was fully briefed and argued before the Eleventh Circuit. That court's failure to resolve the issue properly, therefore, is a serious matter that should be addressed by this Court. Finally, this Court should exercise its supervisory power to make it clear that unethical conduct of the judiciary and bar of the Federal Courts will not be tolerated.

Respectfully submitted,

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